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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE FIRST NATIONAL BANK OF PORTLAND, OREGON, a Corporation,

Appellant

vs.

E. J. DODGE COMPANY, a Corporation,

Appellee

Brief in behalf of E. J. Dodge Company, Appellee

On Appeal from the District Court of the United States for the District of Oregon

Names and addresses of the Attorneys of Record:

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For the Appellee

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For the Appellant

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The Bill of Complaint herein alleges that the E. J. Dodge Company, appellee herein, is and was at all the times mentioned in said Bill, a California corporation having its principal place of business in the City of San Francisco, in said State;

That appellant is and was at all the times mentioned in said complaint, a national banking corporation, hav-

ing its principal place of business in the City of Portland, State of Oregon;

That appellee was incorporated for the purpose, among other things, of carrying on a general lumber manufacturing business, and is and was at all the times mentioned in said complaint, actually engaged in said business;

That it was incorporated with a capital stock of $300,000, and the number of shares into which it was and is divided, is 3,000 shares, of the par value of $100 per share, all of which capital stock was and has been actually subscribed, and certificates of stock duly issued therefor;

That on or about September 25, 1914, appellant was the owner and in possession of 200 shares of the capital stock of said appellee, and on that date entered into an agreement with appellee to sell to it said shares of stock for the sum of $41,000; that appellee, in carrying out said agreement, executed to appellant four promissory notes aggregating said sum of $41,000, payable, respectively, one, two, three, and four years after date; that upon the execution of said promissory notes they were delivered to said appellant, which ever since has been and now is in possession of said notes, claiming to own and hold the same;

That the agreement to purchase its own stock by said appellee from said appellant, is illegal and void as in violation of the provisions of Section 309 of the Civil Code of the State of California, prohibiting directors of corporations from reducing the capital stock; that the phrase "capital stock," as used in this section, has

been construed by the Supreme Court of the State of California to mean not the shares of which the nominal capital is composed, but the actual capital, i. e., assets with which the corporation carries on its corporate business;

That said 200 shares of stock have been at all the times mentioned in said bill of complaint, and are now in the custody and possession of said appellant, and have never been transferred on the books of said appellee; that under and by virtue of the terms of said agreement the said shares of stock were to remain in the possession of appellant until said notes were fully paid, when the same were thereupon to be delivered to plaintiff;

That said promissory notes and each of them were and are negotiable in form and each one upon its face purports to have been made by said plaintiff for a valuable consideration, and bears the imprint of the corporate seal of said plaintiff, and nothing shows thereon the purpose or consideration for which said notes or any of them were issued, and as your orator is informed and believes, said defendant intends to and threatens to negotiate, dispose of and transfer to bona fide purchasers for value, said promissory notes if not restrained and prevented therefrom by an order of this Court *pendente lite;* that said negotiation, transfer and disposal of said promissory notes by said defendant would cause plaintiff irreparable loss and injury, and irremediable and gross injustice; and your orator is further informed and therefore believes, that the said defendant intends to enforce the collection of said prom-

issory notes as they become due from said plaintiff, and to that end will commence an action for that purpose against plaintiff in either the State Court of Oregon or the District Court of the United States in and for the District of Oregon, unless restrained and prevented by an order of this Honorable Court. (P. 10, R.)

On the filing of this bill, the Court, under Section 73 of the Rules of Practice for Courts of Equity of the United States, issued an order to show cause why the injunction *pendente lite* prayed for in said bill of complaint, should not be granted. (P. 14, R.)

On the 20th day of November, 1915, at ten o'clock a. m., the time mentioned in said Order to Show Cause, the application of plaintiff for a preliminary injunction *pendente lite* was regularly heard by the Court, the respective parties appearing by counsel and the matter having been submitted to the Court for its decision, a preliminary injunction *pendente lite* was issued under the seal of the Court, enjoining appellant from:

1. Negotiating, transferring or disposing, by endorsement, assignment or otherwise, any of the promissory notes mentioned in said bill of complaint.

2. Instituting or prosecuting any action in any State or United States Court against plaintiff by defendant to enforce the payment of said promissory notes.

The appellee was ordered to file a bond with good and sufficient security in the sum of $10,000 to pay all costs and damages accruing to defendant by reason of the injunction, if the same be wrongful or without sufficient cause. (P. 22, R.)

Afterwards, said bond was duly filed and approved by said Court. (P. 25, R.)

Thereupon a preliminary injunction was issued following the language of the order therefor. (P. 27, R.)

The foregoing constitutes the material allegations of the bill upon which appellee asks for an injunction and which it now maintains was sufficient to invoke the equitable relief prayed for.

The allegations of the bill were substantially admitted by the affidavit of E. A. Wyld introduced in evidence at the hearing herein by appellant. (P. 17, R.)

The allegations in reference to the "apparent authority" of E. D. Porter to act for the appellee in entering into this contract may be well treated as descriptive of the person who acted for the appellant in executing the contract set forth in the bill of complaint. Whether he acted with or without authority is not material. Neither does the fact that the sale of the stock to appellee was made in good faith and for full value, nor that appellant acquired title to said stock from the prior owner thereof in pursuance of an agreement with appellee that it would do so and thus enable appellant to sell said stock to appellee (as appears by the affidavit of E. A. Wyld made on behalf of appellant), constitute a defense to the action, and in that behalf appellee submits the following points and authorities in support of the injunction *pendente lite* issued herein:

THE AGREEMENT IS VOID.

"The purchase by the corporation of its own shares is illegal and void, as in violation of the provisions of Section 309 of the Civil Code [State of California] prohibiting directors of corporations from . . . reducing the 'capital stock.'

"The phrase, capital stock, as used in this section, has been construed by the Supreme Court of this State to mean not the shares of which the nominal capital is composed, but the actual capital, i. e., assets with which the corporation carries on its corporate business."

Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, and cases there cited;

Same case, Ann. Cas. 1914 B, 1013, and 44 L. R. A. N. S. 156.

"This Court will adopt the construction of a State statute given to it by the highest tribunal of that State."

Foster Federal Practice, Vol. 22, Par. 375.

"A decision of the highest court of a State interpreting a statute of that State is conclusive on the Federal Courts as to the meaning of such statute."

Spinello v. New York, N. H. & H. R. Co., 183 Fed. 762.

THE PLAINTIFF IS A PROPER PARTY TO BRING THE ACTION.

"As a general rule, a corporation or its stockholders may attack the validity of a corporate contract which is *ultra vires* in the true sense and void."

Westerlund v. Black Bear Mining Co., 203 Fed. 599;

Holt v. California Development Co., 161 Fed. 3.

EQUITY WILL ALWAYS INTERFERE AND PREVENT BY INJUNCTION THE ALIENATION OF PROPERTY WHERE IT WOULD WORK IRREMEDIAL OR GROSS INJUSTICE.

"Injunctions may be obtained to prevent the alienation of property 'where it would work irremediable or gross injustice.' An injunction would, therefore, issue to prevent the transfer of notes whether negotiable or not, whose possession gives their holder a presumptive title to the rights which they evidence, when he threatens or is about to use them in an inequitable manner."

Foster Federal Practice, Vol. 1, Par. 212.

"A court of equity will interpose by injunction to prevent the transfer of a specific thing, which, if transferred, will be irretrievably lost to the owner, such as negotiable securities and stocks."

Osborn et al. v. Bank of the United States, 9 Wheaton, page 738.

"In the meantime the note might be negotiated to a claimed bona fide purchaser."

Monmouth Inv. Co. v. Means, 151 Fed. Rep. 166.

"A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled."

Ingram v. Smith, 83 Cal. Rep. 238.

THE CONTRACT BEING VOID, IT IS INCAPABLE OF RATIFICATION BY ESTOPPEL OR OTHERWISE.

"An act or contract of a corporation which is beyond the scope of its corporate powers, an act that it cannot lawfully do in any way or manner

under any circumstances, is incapable of ratification by estoppel or otherwise, and the corporation itself may challenge it."

Westerlund v. Black Bear Mining Co., 203 Fed. Rep. 612.

"A contract made by a corporation which is *ultra vires* in the true sense is void, and neither the corporation nor a stockholder is estopped to attack its validity by the fact that the corporation or the other party has acted under it, nor by delay in bringing suit for its cancellation."

Holt v. California Development Co., 161 Fed. Rep. 3;

Central Transp. Co. v. Pullman Car Co., 139 U. S. 24;

Converse v. Emerson Talcott & Co., 90 N. E. Rep. 269.

INJUNCTION PROPER TO STAY PROCEEDINGS IN OTHER COURTS.

"The Federal Court having first acquired jurisdiction of the parties and subject-matter of the action, has full authority to restrain the parties from resorting to proceedings in a State Court having concurrent jurisdiction, which would defeat or impair the Federal Court's jurisdiction."

Rickey Land Company v. Miller & Lux, 152 Fed. Rep. 11.

"The Federal Court is not prohibited by Rev. St., Sec. 720, from issuing an injunction to restrain the prosecution in a State Court of a threatened suit which has not been actually begun."

Texas, etc., Co. v. Kuteman, 54 Fed. Rep. 547.

APPELLANT WAS CHARGED WITH NOTICE OF THE VOID ACT OF APPELLEE.

"The powers delegated by the State to corporations are matters of public law, of which no one can plead ignorance. A party dealing with a corporation having limited and delegated powers is chargeable with notice of those powers and their limitations and cannot plead his ignorance of their existence."

Steele v. Fraternal Tribunes, 106 Am. St. Rep. 160;

Central Transp. Co. v. Pullman Car Co., 139 U. S. 24.

THE GRANTING OF AN INJUNCTION *PENDENTE LITE* IS A MATTER OF DISCRETION OF THE COURT BELOW AND WILL NOT BE DISTURBED IN THE ABSENCE OF A SHOWING OF AN ABUSE OF THAT DISCRETION.

"Where, however, the sole object for which an injunction is sought, is the protection of property or legitimate business, or the maintenance of the *status quo,* until the question of right between the parties can be decided on final hearing, the injunction properly may be allowed, even though there be serious doubt of the ultimate success of the complainant. There is abundant authority in support of these views."

Wilmington City Ry. Co. v. Taylor, 198 Fed. Rep. 198.

"The granting or withholding of an interlocutory injunction rests in the sound judicial discretion of the Court of original jurisdiction, and, where that Court has not departed from the equitable rules and principles established for its guidance, its orders in this regard may not be reversed by the Appellate

Court without clear proof that it has abused its discretion. An appeal from such an order does not invoke the judicial discretion of the Appellate Court. The question is not whether or not the Appellate Court would have made or would make the order. It is to the discretion of the trial Court, not to that of the Appellate Court, that the law has entrusted the granting or refusing of such an injunction, and the question here is: Does the proof clearly establish an abuse of that discretion by the Court below?''

Fireball Gas Tank & I. Co. v. Commercial Acetylene Co., 198 Fed. Rep. 652.

''But a full trial of the merits is not required on a hearing of an application for a preliminary injunction. Issuance of such a writ is largely within the discretion of the trial Court. On review a reversal is not permissible unless a clear abuse of discretion appears.''

City of Kankakee v. American Water Supply Co., 199 Fed. Rep. 760.

''If it appears that the injury to the complainants will be serious, and the injury to the respondents comparatively slight, the injunction will be granted.''

Carpenter v. Knollwood Cemetery, 188 Fed. Rep. 857.

The contract remains wholly executory in that the stock was not to be delivered until the notes were paid. The possession and title of the stock as appears by the bill remain with appellant to be delivered to appellee when the notes were fully paid. (P. 6 and 7, R.)

The language quoted from the California decision (*Schulte v. Boulevard Gardens Land Co.,* 164 Cal. 464) is not susceptible of the interpretation placed upon it by counsel for appellant, as will appear by the syllabus of that decision, viz.:

> "An agreement by a corporation, constituting a condition and a part of the consideration of an entire *contract under which its stock was originally issued,* obligating it, at the election of the stockholder, to repurchase the stock at a stated price, is not within the inhibition of the section. Such an agreement is enforceable against the corporation, subject to the qualification that the rights of creditors are not injuriously affected, and that it would not result in a fraudulent invasion of the rights of other stockholders."

It certainly cannot be urged as a legal proposition that if the promissory notes were negotiated by appellant and passed into the hands of bona fide purchasers for value, without notice, that appellee would have a valid defense based on the facts appearing in the bill herein.

The order should be affirmed.

Respectfully submitted,

F. A. Cutler,

Attorney for Appellee.